

1473.

APPROVAL, BONDS OF THE VILLAGE OF OAKWOOD, MONTGOMERY COUNTY—\$35,000.00.

COLUMBUS, OHIO, December 30, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1474.

PARTITION FENCE—LAND OWNED BY CEMETERY ASSOCIATION OUTSIDE OF MUNICIPALITY—COST OF REPAIRING OR BUILDING FENCE.

SYLLABUS:

Where land owned by a cemetery association outside of a municipality adjoins land of other persons, it is the duty of such cemetery association under the provisions of Sections 5908, et seq. of the General Code, to participate in the cost of the repairing or building of a partition fence, provided such fence will be of some benefit to the lands of such cemetery association.

COLUMBUS, OHIO, December 30, 1927.

HON. JAMES S. McDEVITT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication of recent date requesting my opinion as follows:

“I have been unable to find anything definite on the question as to what the law is as to fences which enclose a cemetery ground owned and operated by a cemetery association incorporated under the laws of Ohio.

The specific instance which I have in mind is where a cemetery up until about some twenty years ago was owned by some church but was taken over by a cemetery association properly incorporated and which corporation is maintained and operated by virtue of the income of a certain trust fund which it has. During the time the church owned the cemetery and always since that time the fences have been kept in repair or rebuilt by the cemetery association and the adjoining land owner in equal shares the same as any partition fence between two farms. This particular cemetery is located just at the edge of a village corporation by the name of Martinsburg.

The question which has arisen is whether or not a cemetery association must enclose its lands with a suitable fence at its own expense or is the general statute as to partition fences applicable in this case. My understanding is that where a cemetery is owned and operated by township trustees that the duty falls on the township trustees to enclose the cemetery grounds but I have been unable to answer the question where the cemetery grounds are owned and controlled by a cemetery association.”

Sections 10093 to 10119-1, both inclusive of the General Code, relating to cemetery associations, their powers and duties, are found in the General Code under a chapter entitled "Cemetery Associations."

While it is true, as stated in your letter, that there are no provisions in the sections under this chapter, which require a cemetery association to build and maintain a fence surrounding its grounds, yet under the provisions of Section 10109, General Code, said association may expend funds or incur indebtedness to enclose its grounds. The pertinent part of said section provides:

"The receipts and income of such a company or association, whether derived from the sale of lots, from donation, or otherwise, shall be applied to the payment for such lands, to the laying out, *preservation, protection*, and establishment of the cemetery, the avenues within it * * * and other general purposes of such company or association. No debts shall be contracted in anticipation of paid receipts, except for the original purchase of the land, and laying out, *enclosing*, and embellishing the grounds, and avenues therein * * *" (Italics the writer's.)

The question which you propound involves a consideration of whether Sections 5908, et seq. of the General Code, are sufficiently comprehensive in their terms to make them applicable to cemetery associations.

At the outset, it may be stated that the provisions of said sections are applicable to cemetery associations unless the legislature has expressly exempted said associations from their provisions.

In Opinion No. 1283, rendered by this department on November 22, 1927, Opinions Attorney General, 1927, in the first paragraph of the syllabus it was held:

"By the terms of Sections 5908 et seq., General Code, land owners must build partition fences, unless such fences will be of *no benefit* to their lands."

Let us look for the moment to the several exemptions from the operation of various statutes that the legislature has given to cemetery associations. Under the provisions of Section 10093, General Code, land or other property held and used by a cemetery association exclusively for burial purposes is exempt from taxation, execution or appropriation for any other public purpose. Under the provisions of Section 10101, General Code, burial lots sold by such association are exempt from taxation, execution, attachment, or any other claim, lien, or process whatever, if used exclusively for burial purposes and in no wise with the view to profit. By the terms of Section 10105 of the General Code, such burial grounds owned by a cemetery association are not subject to sale or execution on a judgment, to taxation, to dower, or to compulsory partition.

It will be seen from the provisions of Sections 10093 to 10119-1, inclusive, of the General Code that there are no provisions therein exempting cemetery associations from the provisions of Sections 5908, et seq. of the General Code.

Section 5908, General Code, provides:

"The owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them, unless otherwise agreed upon by them in writing, and witnessed by two persons. This chapter shall not apply to the enclosure of lots in municipal corporations or of lands laid out into lots outside of municipal corporations, or affect any provision of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad."

Section 5910, General Code, provides in substance that if a person neglects to build or repair a partition fence, or the portion thereof which he is required to build or maintain, the person aggrieved may complain to the township trustees and such township trustees after ten days written notice to the adjoining land owners of the time and place of meeting may view the premises where such fence is located, or is to be built, and assign in writing, to each person, his equal share thereof.

Under the provisions of Section 5913, General Code, if either person to whom a portion of a fence is assigned fails to build his portion, the township trustees upon the application of the person aggrieved may sell the contract to the lowest responsible bidder after advertisement for bids, and under the provisions of Section 5914, General Code, the cost of such fence is certified to the township clerk and, if not paid within thirty days, a proportionate amount of the cost and expense of the sale of such contract, together with the cost of such fence is certified to the county auditor, who, under the provisions of Section 5915, General Code, places such amounts upon the tax duplicate to be collected as taxes.

The question naturally arises whether, if the trustees of the cemetery association should refuse to pay its share of the cost of repairing or rebuilding said fence, under the provisions of Sections 5913, 5914 and 5915, supra, said sections will be applicable in view of the exemptions relative to the property of said cemetery association, which is used for burial purposes being free from taxation and sale for failure to pay said tax.

It is quite apparent that the term "taxation" as used in Sections 10093 and 10105, General Code, apply to taxes that are levied generally upon land and personal property and not to the cost of repairing or building a partition fence which is placed upon the tax duplicate solely because an adjoining land owner has refused to pay. Provision for placing this cost "upon the tax duplicate" and collecting it "as other taxes", is simply a means of enforcing payment providing the land owner refuses to pay his share of the cost of said partition fence. However, the question of the enforcement of such a lien against property of a cemetery association for its failure to pay the cost of a partition fence as certified to the county auditor, is not without some difficulty.

Your attention is, however, directed to the case of *Lima vs. Cemetery Association*, reported in 42 O. S. at page 128, wherein the court held, in the third and fourth branches of the syllabus of said case as follows:

"3. An incorporated cemetery association is not relieved from an assessment for a street improvement by a statutory provision exempting its lands from taxation, such exemption being regarded as confined to taxes as distinguished from local assessments.

4. While the lands of an incorporated cemetery association, so far as exempted, cannot be sold to pay an assessment for the improvement of a street, the municipal corporation may enforce the assessment by such remedies as the statute and courts of equity afford."

The above case was approved and followed in *Jackson vs. Board of Education*, 115 O. S. page 368.

I am not unmindful of the provisions of Section 10103, General Code, which provides in part as follows:

"* * * Every such company or association shall cause a plat of its grounds and of the lots by it laid out, to be made and recorded, or filed in the recorder's office of the county in which situated; the lots to be numbered by regular consecutive numbers."

In the present case the cemetery in question lies just outside the corporate limits of a village and it will be recalled that Section 5908, supra, provides that said section and

following sections of the chapter entitled "fences" do not apply to "lands laid out into lots outside of municipal corporations." It is quite evident to me that the lots referred to in Section 5908, supra, refer to building allotments where lots are laid out for building purposes and not to the lots set aside for burial purposes as provided in Section 10103, supra.

From the foregoing discussion and authorities cited, it is my opinion that where land owned by a cemetery association outside of a municipality adjoins land of other persons, that it is the duty of such cemetery association under the provisions of Sections 5908, et seq., of the General Code, to participate in the cost of the repairing or building of a partition fence, provided such fence will be of some benefit to the lands of such cemetery association.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1475.

APPROVAL, BONDS OF BREWSTER VILLAGE SCHOOL DISTRICT, STARK COUNTY, OHIO—\$85,000.00.

COLUMBUS, OHIO, December 30, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

1476.

INCORPORATION OF TERRITORY IMMEDIATELY SURROUNDING SUMMER RESORT, PARK, ETC., DISCUSSED.

SYLLABUS:

In the course of proceedings for the incorporation of territory immediately surrounding a summer resort, park, lake or picnic grounds as provided in Sections 3545 and 3546, General Code, after the election therein provided for is held, and it is determined that a majority of ballots cast at such election contain the words "For incorporation" there should be filed with the county recorder of the county, wherein such territory is located, proof in writing of the existence of all the facts authorizing the incorporation of such territory and empowering it to function as a municipality, which written proof should be recorded by the county recorder and proper certification made by him to the secretary of state. Thereafter all laws governing the creation and regulation of incorporated villages will be applicable to the territory so incorporated.

COLUMBUS, OHIO, December 30, 1927.

HON. HENRY W. HARTER, JR., *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, requesting my opinion, as follows: